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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 61

BEST & COMPANY, INC., APPELLANT,

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE FOR THE STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

FILED APRIL 30, 1940.

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IN SUPERIOR COURT OF WAKE COUNTY

BEST & COMPANY, INC.,

v.

A. J. MAXWELL, Commissioner of Revenue

Before Frizzelle, J., January 16, 1939, Term, Wake Superior Court. Defendant Appealed

Summons dated June 11, 1938, showing service June 14, 1938, appears in original record.

COMPLAINT

The plaintiff, complaining of the defendant, alleges:

1. That the plaintiff is a corporation organized and existing under the laws of the State of New York.

2. The defendant is the Commissioner of Revenue for the State of North Carolina, and at the times hereinafter mentioned was acting as such; that the defendant is a resident of Wake County, North Carolina.

3. The defendant has demanded and under threat of legal process has collected from the plaintiff the sum of $250.00 alleged to be due by the plaintiff as a license tax under section 121 of Chapter 127 of the Public Laws of 1937, otherwise designated as C. S. 7880 (51), and particularly under paragraph (e) thereof, imposing a license tax upon the persons, firms and corporations not being regular retail merchants in the State of North Carolina who display sam- [fol. 3] ples, goods, wares or merchandise in any hotel room or in any house, rented or occupied temporarily for the purpose of securing orders for the retail sale of such goods, wares or merchandise.

4. Section 121 of Chapter 127 of the Public Laws of 1937, otherwise designated as C. S. 7880 (51) and particularly subsection (e) thereof, and such other parts of the said section as relate to subsection (e) thereof, are unconstitutional, null and void, for that they are in contravention of the Constitution of the United States, particularly

the commerce clause, being Article I, Section 8, paragraph 3 thereof, the privileges and immunities clauses, being Article IV, Section 2, and the equal protection of law clause, being Amendment Fourteen, Section 1 thereof; that the demand made upon the plaintiff and the collection from the plaintiff of $250.00 pursuant to the said section of the Revenue Act was therefore without authority of law.

5. The plaintiff paid to the defendant the full amount of the tax demanded under the aforementioned section, to-wit, $250.00, on or about the 9th day of February, 1938; that the defendant was the proper officer to whom such tax, if owed, should be paid; that the plaintiff notified the defendant in writing that it paid the said tax under protest, that the said payment was made under threat of legal process and without prejudice to the plaintiff's right to recover the said tax; that within 30 days thereafter, to-wit, on or about the 16h day of February, 1938, the plaintiff in writing demanded of the defendant the return of the sum of $250.00 paid as aforesaid; that the defendant, on or about the 18th day of February, 1938, declined in writing to comply with such demand and refund the said sum of $250.00 or any part thereof to the plaintiff; that more than 90 days has elapsed since the plaintiff demanded of the defendant the return of the sum of $250.00, and more than 90 days has [fol. 4] elapsed since the defendant declined in writing to return the said sum of $250.00, and that the defendant still refuses to return to the plaintiff the said sum of $250.00, or any part thereof.

Wherefore, the plaintiff prays that it recover of the defendant the sum of $250.00, together with interest thereon from the 9th day of February, 1938; for the costs of this action, and for such other and further relief as to the Court may seem just and proper.

Manly, Hendren & Womble, Counsel for Plaintiff.

(Verified June 4, 1938, by Alfred W. Niles, Treasurer of plff., at State of New York, City of New York.)

Order permitting plaintiff to file amended complaint, and dated Sept. 29, 1938, appears in the record, consented to by Manly, Hendren & Womble and T. W. Bruton, counsel for defendant.

IN SUPERIOR COURT OF WAKE COUNTY

AMENDED COMPLAINT

With leave of Court, the plaintiff files the following Amended Complaint in lieu of the original complaint filed herein:

1. The plaintiff is a corporation organized and existing under the laws of the State of New York.

2. The defendant is the Commissioner of Revenue for the State of North Carolina, and at the times hereinafter mentioned was acting as such; that the defendant is a resident of Wake County, North Carolina.

3. The defendant has demanded and under threat of legal process has collected from the plaintiff the sum of $250.00 alleged to be due by the plaintiff as a license tax under section 121 of Chapter 127 of the Public Laws of 1937, otherwise designated as C. S. 7880 (51) and particularly under paragraph (e) thereof, imposing a license tax upon the persons, firms and corporations not being regular retail [fol. 5] merchants in the State of North Carolina, who display samples, goods, wares or merchandise in any hotel room or in any house, rented or occupied temporarily for the purpose of securing orders for the retail sale of such goods, wares or merchandise.

4. The plaintiff conducts a retail merchandise establishment and has its principal office and place of business at 372 Fifth Avenue, New York, N. Y., and is not a regular retail merchant in the State of North Carolina within the meaning of section 121 of Chapter 127 of the Public Laws of 1937, otherwise designated as C. S. 7880 (51); that on or just prior to February 9, 1938, the plaintiff, through its representative, rented a display room for a few days in the Robert E. Lee hotel in the City of Winston-Salem, and there displayed certain samples of its merchandise for the purpose of securing orders for such merchandise at retail sale; that the plaintiff's representative, on or about February 9, 1938, took orders for merchandise, samples of which were so displayed, and transmitted the said orders to the plaintiff's principal place of business in New York, where such orders were either accepted or rejected; that one or more orders so taken were accepted by the plaintiffs in New York,

and the said orders so accepted were filled by forwarding the merchandise ordered from the plaintiff's stock in the City of New York by mail or parcel post to the customer or customers in North Carolina; that such orders were not given, accepted or filled for wholesale trade; that in no instance did the representative aforementioned actually sell or deliver any merchandise in the State of North Carolina, but took orders only subject to acceptance by the plaintiff at its principal office in New York; that invoices for merchandise so displayed, ordered, accepted and shipped were sent by the plaintiff to the customer or customers directly from its place of business in New York City; that all col- [fol. 6] lections therefor were made by the plaintiff through its office in New York City directly from the customer or customers from whom the several orders were taken; that the plaintiff's representative displaying samples of merchandise at the Robert E. Lee Hotel in Winston-Salem, North Carolina, had no ownership whatsoever in the merchandise displayed or in the merchandise out of which the order or orders taken by him were filled; that the license tax referred to in article 3 hereof collected from the plaintiff by threat of legal process was assessed by reason of the transactions herein described.

5. Section 121 of Chapter 127 of the Public Laws of 1937, otherwise designated as C. S. 7880 (51) and particularly subsection (e) thereof, and such other parts of the said section as relate to subsection (e) thereof, are unconstitutional, null and void, for that they are in contravention of the Constitution of the United States, particularly the commerce clause, being Article I, Section 8, paragraph 3 thereof; the privileges and immunities clauses, being Article IV, Section 2; and the equal protection of law clause, being Amendment Fourteen, Section 1 thereof; that the demand made upon the plaintiff and the collection from the plaintiff of $250.00 pursuant to the said section of the Revenue Act was therefore without authority of law.

6. The plaintiff paid to the defendant the full amount of the tax demanded under the aforementioned section, to-wit, $250.00, on or about the 9th day of February, 1938; that the defendant was the proper officer to whom such tax, if owed, should be paid; that the plaintiff notified the defendant in writing that it paid the said tax under protest; that the said payment was made under threat of legal process

and without prejudice to the plaintiff's right to recover the said tax; that within 30 days thereafter, to-wit, on or about the 16th day of February, 1938, the plaintiff in writing de-
[fol. 7] manded of the defendant the return of the sum of $250.00 paid as aforesaid; that the defendant on or about the 18th day of February, 1938, declined in writing to comply with such demand and refund the said sum of $250.00, or any part thereof to the plaintiff; that more than 90 days has elapsed since the plaintiff demanded of the defendant the return of the sum of $250.00, and more than 90 days has elapsed since the defendant declined in writing to return the said sum of $250.00, and that the defendant still refuses to return to the plaintiff the said sum of $250.00, or any part thereof.

Wherefore, the plaintiff prays that it recover of the defendant the sum of $250.00, together with interest thereon from the 9th day of February, 1938; for the costs of this action; and for such other and further relief as to the Court may seem just and proper.

Manly, Hendren & Womble, Counsel for Plaintiff.

(Verified Aug. 23, 1938, at State of New York, City of New York, by Alfred W. Miles, Vice-Pres. of plaintiff.)

IN SUPERIOR COURT OF WAKE COUNTY

ANSWER

The defendant A. J. Maxwell, Commissioner of Revenue, answering the complaint of the plaintiff, says:

1. The allegations contained in paragraph 1 are admitted.

2. The allegations contained in paragraph 2 are admitted.

3. Answering paragraph 3, this defendant says that as Commissioner of Revenue he demanded and collected from the plaintiff the sum of $250.00 due by it as a license tax levied under section 121 (e) of Chapter 127 of the Public Laws of 1937, which imposes a license tax upon persons, firms or corporations not being regular retail merchants in the State of North Carolina, who display samples, goods, wares, or merchandise in any hotel room or in any house
[fol. 8] rented or occupied temporarily for the purpose of

securing orders for the retail sale of such goods, wares or merchandise, which is the only tax levied by the State of North Carolina against this plaintiff. Except as herein admitted, all other allegations in this paragraph are denied.

4. Answering paragraph 4, the defendant admits that the plaintiff conducts a retail merchandise establishment and has its principal office and place of business at 372 Fifth Avenue, New York City, and is not a regular retail merchant in the State of North Carolina; that on or just prior to February 9, 1938, the plaintiff rented a display room for a few days in the Robert E. Lee Hotel in the City of Winston-Salem, and there displayed certain samples of its merchandise for the purpose of securing orders for the retail sale of such merchandise; that the plaintiff on or about February 9, 1938, took orders for merchandise, samples of which were so displayed, and the said orders were filled from the plaintiff's stock in the City of New York by mailing the same to customer or customers in North Carolina; that such orders were not given, accepted or filled for wholesale trade; that in no instance was the merchandise actually delivered at the time of the display, or the giving of the order; that such orders taken, as above described, were taken only subject to acceptance by the plaintiff at its principal office in New York; that invoices for merchandise so displayed, ordered, accepted and shipped were sent by the plaintiff to the customer or customers directly from its place of business in New York City; that the man in charge of the plaintiff's display of samples of merchandise at the Robert E. Lee Hotel in Winston-Salem had no ownership whatsoever in the merchandise displayed, or in the merchandise out of which the order or orders taken at Winston-Salem were filled. Except as herein admitted, all other allegations in paragraph 4 are denied.

[fol. 9] 5. Paragraph 5 of the complaint is denied.

6. Paragraph 6 of the complaint is admitted, except that it is denied that the tax in controversy in this action was paid by the plaintiff under threat of legal process.

Further Answering and for a Further and More Complete Defense, this defendant alleges:

That on or about February 9, 1938, the plaintiff rented a display room in the Robert E. Lee Hotel in the City of

Winston-Salem and there displayed certain of its merchandise for the examination of the buying public, making the display in the same manner as regular retail merchants in the City of Winston-Salem and, both before and at the time said display was being made, by advertising in the same manner as regular retail merchants, invited the buying public to make purchases of merchandise; that the plaintiff had, at that time, no regular place of business in the State of North Carolina and was not a regular retail merchant within the State of North Carolina; that the State of North Carolina, through section 121(e) of Chapter 127 of the Public Laws of 1937, levied a tax of $250.00 upon the plaintiff for the use of such space, for the display of the goods, wares and merchandise of the plaintiff, and that said tax is the only tax levied by the State of North Carolina against the plaintiff, or against other persons, firms or corporations operating in the State of North Carolina in like manner.

Harry McMullan, Attorney General. T. W. Bruton, Assistant Attorney General. R. H. Wettach, Assistant Attorney General. L. O. Gregory, Assistant Attorney General. I. M. Bailey, Amicus Curiae.

(Verified Nov. 14, 1938.)

[fol. 10] IN SUPERIOR COURT OF WAKE COUNTY

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the plaintiff and the defendant that the following, or so much thereof as the Court may deem relevant and material to the proper determination of the issues herein, shall constitute the facts in the case upon which the issues shall be determined and judgment rendered.

1. That the plaintiff was at the times mentioned in the complaint a New York corporation. The defendant was at the times mentioned in the complaint the Commissioner of Revenue for North Carolina and acted as the Commissioner of Revenue for North Carolina in all matters referred to in the complaint.

2. That on February 9, 1938, the plaintiff, pursuant to a demand made upon it by the defendant under section 121 (e) of Chapter 127, Public Laws of 1937, otherwise identified as C. S. 7880 (51) (e), paid to the defendant the sum of $250.00, that at the time of making such payment the plaintiff notified the defendant in writing that the said payment was made under protest; that the plaintiff has complied fully with all of the requirements of Section 836 of Chapter 127 of the Public Laws of 1937, otherwise identified as C. S. 7880 (194).

3. That the plaintiff conducts a retail merchandise establishment and has its principal office and place of business at 372 Fifth Avenue, New York City, and is not a regular retail merchant in the State of North Carolina; that on or just prior to February 9, 1938, the plaintiff rented a display room for a period of several days in the Robert E. Lee Hotel in the City of Winston-Salem and there displayed certain samples of its merchandise for the purpose of securing orders for the retail sale of such merchandise; that the plaintiff on or about February 9, 1938, took orders for merchandise, samples of which were displayed, and the said [fol. 11] orders were filled from the plaintiff's stock of merchandise in the City of New York by mailing the same to customer or customers in North Carolina; that such orders were not given, accepted or filled for wholesale trade; that in no instance was the merchandise actually delivered at the time of the display or the giving of the order; that such orders taken as above described were taken subject to acceptance by the plaintiff at its principal office in New York; that invoices for merchandise so displayed, ordered, accepted and shipped were sent by the plaintiff to the customer or customers directly from its place of business in New York City; that the merchandise displaced was for the examination of the buying public and was displayed upon tables or racks within the space rented by the plaintiff in the Robert E. Lee Hotel; that the plaintiff advertised the display of its merchandise in the Robert E. Lee Hotel through notices mailed to prospective purchasers which were sent out in advance of the display of the merchandise; that the plaintiff had at that time no regular place of business in the State of North Carolina; that the State of North Carolina, through Section 121 (e) of Chapter 127 of Public Laws of 1937, levied the tax of $250.00 upon the plaintiff under the

provisions of said section, and said tax is the only tax levied by the State of North Carolina against the plaintiff or against other persons, firms or corporations operating in the State of North Carolina in like manner.

This the 26 day of January, 1939.

Manly, Hendren & Womble, W. P. Sandridge, Counsel for Plaintiff. Harry McMullan, Counsel for Defendant, Attorney General. T. Wade Bruton, Assistant Attorney General. R. H. Wettach, Assistant Attorney General. Lee O. Gregory, Assist-
[fol. 12] ant Attorney General. (Signed) I. M. Bailey, Amicus Curiae.

IN SUPERIOR COURT OF WAKE COUNTY

JUDGMENT

This Cause coming on to be heard and being heard before the undersigned Judge Presiding at the January 16, 1939, Term of the Superior Court of Wake County, and being heard upon the pleadings and a stipulation of facts as appear of record; and the plaintiff and the defendant having been represented by counsel, and the Court having fully considered arguments of counsel, the Court is of the opinion that plaintiff is entitled to recover of the defendant the sum of $250.00, with interest thereon from the 9th day of February, 1938;

Now, therefore, it is Considered, Ordered and Decreed that the plaintiff recover of the defendant the sum of $250.00, with interest at six per cent from the 9th day of February, 1938, and that the costs of this action be taxed against the defendant.

J. Paul Frizzelle, Judge Presiding.

IN SUPERIOR COURT OF WAKE COUNTY

APPEAL ENTRIES

To the signing and entry of the foregoing judgment the defendant excepts and appeals to the Supreme Court of North Carolina. Notice given in open court, further notice

waived. It is stipulated and agreed that the record on appeal shall be composed of the following: Summons, com-
[fol. 13] plaint, order, amended complaint, stipulations, judgment, appeal entries and assignments of error.

W. H. Sawyer, C. S. C. Wake County.

IN SUPERIOR COURT OF WAKE COUNTY

STIPULATION RE APPEAL ENTRIES

By stipulation of the parties, through their attorneys, it is agreed that the appeal entries may be signed by the Clerk of the Superior Court.

Consented to.

Manly, Hendren & Womble, Attorneys for Plaintiff.
Harry McMullan, Attorney General. T. Wade Bruton, Assistant Attorney General, of counsel for the defendant. I. M. Bailey, Amicus Curiae.

IN SUPERIOR COURT OF WAKE COUNTY

DEFENDANT APPELLANT'S EXCEPTION AND ASSIGNMENT OF ERROR

The defendant appellant makes the following exception and assignment of error in the appeal to the Supreme Court from the judgment appearing in the record:

1. For that the Court erred in signing and entering the said judgment as set forth in the record, which judgment is erroneous as a matter of law, upon the stipulation of facts appearing in the record.

This constitutes defendant appellant's Exception and Assignment of Error No. 1.

Harry McMullan, Attorney General; T. Wade Bruton, Assistant Attorney General, of counsel for defendant. I. M. Bailey, Amicus Curiae.

(Transcript certified by clerk Superior Court.)

A true copy.

Edward Murray, Clerk of the Supreme Court of North Carolina. (Seal of the Supreme Court of the State of North Carolina.)

[fol. 14] IN SUPREME COURT OF NORTH CAROLINA

No. 463

BEST & COMPANY, INC.,

v.

A. J. MAXWELL, Commissioner of Revenue

Appeal by defendant from Frizzelle, J., January 16 Term, 1939, Wake Superior Court. Reversed.

This is a civil action to recover $250.00 in taxes paid defendant, under protest, by virtue of Chapter 127, Sec. 121, subsec. e (Revenue Act, 1937), of the Public Laws of 1937. It is agreed by the parties that plaintiff is not a regular retail merchant in North Carolina and has no regular place of business in this State; but that plaintiff is a New York corporation having its principal office in New York City. It is likewise agreed that just prior to February 9, 1938, plaintiff rented for several days a display room in the Robert E. Lee Hotel, in Winston-Salem, and there displayed samples and secured retail orders for merchandise, later filled by shipment from the New York office, and that the tax here in dispute was levied upon this activity of plaintiff.

From a judgment for the plaintiff in the sum of $250.00, with interest, defendant appealed to this Court. The only exception and assignment of error is to the signing of the judgment.

Manly, Hendren & Womble and W. P. Sandridge for plaintiff. Atty.-General McMullan and Asst. Attys.-General Bruton Wettach, and Bailey & Lassiter, amicus curiae, for defendant.

OPINION—Filed June 16, 1939

CLARKSON, J.

The only question raised by this appeal: Is the State tax upon the display of samples, goods, etc., (a) in a hotel room, or house rented or occupied temporarily, (b) for the purpose of securing orders for the retail sale of such goods, etc., (c) by a person, firm or corporation, not a regular

retail merchant in the State, invalid as violative of the Commerce Clause of the Constitution of the United States, Art. 1, Sec. 8 (3)? We think not.

[fol. 15] The Act is not challenged as violative of any other provision of either the State or Federal Constitutions. The single question presented for our determination: Does the facts in this case violate the constitutional grant to Congress of the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes?" This clause, and the remainder of the Federal Constitution, is significantly lacking in any prohibition of the taxation of commerce carried on within the borders of any state, and the right of the State to tax such intra-state commerce is not questioned. Further, the Federal Constitution nowhere expressly prohibits the taxation of interstate commerce by a State, or even its direct regulation. The Commerce Clause merely gives to Congress the power to "regulate" commerce among the States. It is well to remember that the Federal Government is one of granted power only; the Tenth Amendment to the Constitution (and North Carolina would not ratify the Constitution until the Bill of Rights had been adopted) declares, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." The "Commerce Clause" has come to be written in capital letters rather by reason of more recent judicial interpretation of the clause than by the clear, expressed intent of the constitutional fathers. The express retention by the States of powers not delegated to the Federal Government argues strongly against the existence of any implied power of the Federal Government (growing out of the Commerce Clause) to strike down a state tax on commercial activity carried on within the borders of the taxing state. Unless the implied prohibition of taxes definitely burdening interstate commerce (developed and given expression in Robbins v. Taxing District, 120 U. S. 489, Real Silk Hosiery Mills Co. v. Portland, 268 U. S., 325, and numerous interim cases) reaches to, and renders immune from state taxation, the commercial activity here taxed, the instant case represents a valid exercise of the state taxing [fol. 16] power. The Supreme Court of the United States has long recognized the force of these considerations and has heretofore indicated that implied prohibitions growing out of the Commerce Clause must, necessarily, be reluc-

tantly and rarely applied. "Whatever amounts to a more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effects upon it are clearly non-existent." Stafford v. Wallace, 258 U. S. 495 (521); Board of Trade v. Olsen, 262 U. S. 1 (37); see also Walton v. State of Missouri, 91 U. S. 275. Nor, by the same standard, can it be presumed that the Supreme Court of the United States will substitute its judgment as to the valid exercise of a state legislature's taxing power for that of the state legislature, unless the tax act "clearly" and "unduly" burdens the "freedom of interstate commerce." "* * * Property within the state, privileges granted by the state, and intrastate commerce done within the state are uniformly held proper subjects of state taxation." Powell. "Indirect encroachments on Federal Authority by the Taxing Powers of the States, 5 Selected Essays on Constitutional Law", at p. 391; also see pp. 418, 470.

It then becomes pertinent to determine whether it can be fairly said that the instant act, in this case, clearly constitutes a direct and undue burden upon interstate commerce. The measure is clear and concise; before it is applicable there must be the following requisites set forth in the law: (a) the act, i. e. the display of samples, goods, etc., (b) the place, i. e. in a hotel room of temporarily occupied house, (c) the mental element, or purpose, i. e., for the purpose of securing orders for retail sale of the goods, etc., and (d) the person, i. e., one not a regular merchant. In essence, [fol. 17] the tax is one imposed upon anyone, not otherwise taxed as a retail merchant, who uses a North Carolina hotel room or temporarily occupied house, for commercial display purposes in the interest of retail sales. It is a use tax, levied in the State of North Carolina upon profitable and commercial activity which has otherwise escaped taxation and which, therefore, discriminates against no one but seeks to remove a discrimination previously existing against regular, taxed, retail merchants. Under this statute the act taxed must occur in North Carolina, and the room where the act transpires must be within the State. The taxed activity

must be directed at the retail trade in North Carolina, seeking to reach personally the citizens and residents of this State. The measure does not in any way impinge upon the activities of the wholesale trade, nor does it discriminate against non-residents. All citizens and residents of North Carolina, and non-residents alike, (other than retail merchants who have already been taxed for their commercial activities) who engage in the taxable activity are liable for the tax. The taxed act is a local one, involving the use of purely local property. The tax in no way hampers the movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce. The tax in no way regulates the inter-state or out-of-state activity of the person seeking to sell by display in North Carolina, nor does it in any way interfere with sales by sample by house-to-house canvassers. Finally, the measure leaves open to the seller the choice as to the manner of soliciting retail sales by display; only when he seeks to localize his commercial activity by temporarily establishing himself at a particular rented and temporary location within this State in his activity in displaying samples and seeking orders subjected to taxation. Although such activity may be in the twilight zone of inter-state commerce, it does not enter that enchanted realm. Although such displaying by sample may ultimately result in orders which will flow into inter-state commerce, such commercial activity cannot cloak itself in immunity from [fol. 18] taxation merely by calling the magic words "Interstate Commerce." The use of North Carolina real estate for the purpose of displaying samples is commercially intended to result in inter-state commerce, but this preliminary activity is merely a separate and distinct effort of the seller seeking, as in the instances of magazine and billboard advertising, to stimulate the desire for the seller's goods. Western Live Stock v. Bureau of Revenue, 303 U. S. 250.

The display use of hotel rooms and temporarily rented property here taxed is not a usual, necessary, or essential part of a commercial, retail business. It is a preliminary and incidental activity which, at the election of the seller, may or may not transpire prior to the beginning of the flow of events which constitute the movement of goods in inter-state commerce. There is a striking analogy here to production, which has consistently been held not to constitute inter-state commerce. Carter v. Carter Coal Co., 298 U. S.

238. As Justice Brandeis, speaking for the Court in Chassaniol v. Greenwood, 291 U. S. 584 (587), so aptly remarked with reference to ginning and warehousing cotton, these are but "steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce." The use of North Carolina realty to display samples is likewise but a step "in preparation for the sale and shipment in interstate * * * commerce," and is essentially intra-state and local in nature. As was said by Justice Bradley in Coe v. Errol, 116 U. S. 517 (525), "There must be a point of time when they cease to be governed exclusively by domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of origin to that of their destination." Justice Bradley was there speaking of certain logs hauled to a river, but if the orders sought by plaintiff is substituted as the res under [fol. 19] consideration the logic of the proposition is compelling that certainly not earlier than the actual placing of the orders with plaintiff can its commercial activity be considered as a part of interstate commerce. No phase of the question is better settled than the fundamental that the mere fact that the products of domestic enterprise are ultimately intended to become subjects of interstate commerce is not sufficient to stamp them with the immunities attaching to interstate commerce proper. Kidd v. Pearson, 128 U. S. 1 (21); Heisler v. Thomas Colliery Co., 260 U. S. 245 (259); Champion Refining Co. v. Corporation Commission, 286 U. S. 210 (235).

The displaying of samples in temporary quarters, here taxed, was peculiarly a local and intra-state act, outside the realm of interstate commerce, because such term can "never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community." Veazie et al. v. Moore, 14 How. 568 (573). Such a local, business activity which is separate and distinct from the transportation and intercourse which is interstate commerce is not freed from state taxation "merely because in the ordinary course such transportation or intercourse is induced by the business."

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (253), and cases cited. In the same case, at p. 254, Justice Stone, speaking for the Court, reiterates the fundamental that, "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way. Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252 (259), 39 S. Ct. 265, 266, 63 L. Ed. 590," and other cases cited. In the Western Live Stock case, supra, the state privilege tax was upheld under a view which we think equally applicable here, to-wit, that "the burden on interstate business is too remote and too attenuated."

[fol. 20] A casual reading of many of the recent pronouncements of the Supreme Court of the United States apparently indicates a gradual broadening of the Federal power over interstate commerce by liberalizing the definition of what falls within that category, with an accompanying, and even more desirable, broadening of the states' taxing power over matters touching the fringe of the garment of interstate commerce. This latter tendency is indicated by two complementary but distinct developments, the one marked by a narrowing of the compass of what constitutes a direct and undue burden on interstate commerce, and the other by a stricter and more rigid interpretation as to what constitutes discrimination against interstate commerce. See "Sales and Use Taxes: Interstate Commerce Pays Its Way," Warren & Schlesinger, 38 Col. Law Rev. 49 (Jan. 1938), for a collection of a number of these cases. These developments argue strongly for the validity of the instant tax.

In Coverdale v. Pipe Line Co., 303 U. S. 604, a state tax upon the production of power to drive gas into interstate commerce was approved. The displaying of goods here taxed is merely a similar preliminary activity seeking to "drive" orders into interstate commerce. In Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U. S., 249, a state tax on storage of gasoline brought into the state through interstate commerce and ultimately used directly in interstate commerce was upheld, such a tax being considered too remote and too indirect a burden upon interstate commerce to justify its being stricken down. Here we have a similar situation, a local, commercial activity within North Carolina

which follows the arrival of plaintiff's representative and precedes the sending of any orders to plaintiff. In Southern Pac. Co. v. Gallagher, 59 S. Ct., 389 (decided Jan. 30, 1939), the California Use Tax was upheld as applicable to equipment bought out of the State and brought into the State for installation on interstate, transportation equipment; there Justice Reed, for the Court, found a "taxable moment" at the point where the goods came to rest in the State and before they were installed on the interstate equipment. In the instant case there is no need for such search for a tax-
[fol. 21] able moment, as the taxed activity was clearly localized in North Carolina; the displaying of the samples was part of a carefully planned campaign, after an elaborate; personalized canvass by mail of large numbers of North Carolina citizens who were considered potential customers. As was pointed out in the Gallagher case, supra, "A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress." Also, it was there said: "The taxable event is the exercise of the property right in California"; here the taxable event is the exercise of the temporary property right in the hotel room or rented house to display samples commercially for retail purposes. Pacific Telephone & Telegraph Co. v. Gallagher, 59 S. Ct. 396, a companion case decided on the same day, again approved the California Use Tax as applied to supplies brought into the State for use in interstate telephone and telegraph communication.

Even earlier, in Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S., 147, and in Henneford v. Silas Mason Co., 300 U. S., 577, the validity of the fundamental theory of the modern "use tax" had been approved; in the latter case, Justice Cardozo, for the Court, used these significant words in concluding the opinion: "A legislature has a wide range of choice in classifying and limiting the subjects of taxation. Bell's Gap R. Co. v. Pennsylvania, 134 U. S., 232 (237); Ohio Oil Co. v. Conway, 281 U. S. 146 (159). The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all. Flint v. Stone Tracy Co., 220 U. S., 107 (158-9). * * * Such questions of fiscal policy will not

be answered by a Court. The legislature might make the tax base as broad or as narrow as it pleased."

[fol. 22] The Courts have not been alone in noting the economic imperative that "interstate business must pay its way". Students of taxation have become increasingly aware that a judicial over-emphasis upon the doctrine of immunity of interstate commerce from state taxation amounts to discrimination against intra-state business. Lutz, H. L., Public Finance, 3rd ed., (1936), p. 326. State tax administrators have found it difficult to reach taxpayers in interstate commerce even when the plain and obvious intent was to tax them on the same basis as those engaged in intra-state commerce. R. M. Haig, "The Co-ordination of the Federal and State Tax Systems," Proceedings of the National Tax Association, (1932), p. 220; Marvel Stockwell, "The Co-ordination of Federal, State and Local Taxation," The Tax Magazine, (April, 1938), p. 198-9. None too soon, perhaps, the Supreme Court of the United States appears to have adopted a new approach to the problem of state taxation as it relates to interstate commerce, an approach involving a new emphasis upon the preservation of equality of tax burden between competing business enterprises. See William B. Lockhart, "The Sales Tax in Interstate Commerce," 52 Harvard Law Review (Feb. 1939), p. 617.

The tax here discussed is a part of a comprehensive, state tax program designed to reach and to tax equally and fairly all types of commercially remunerative activity which has the protection of our laws. Local mercantile businesses, which for the most part are small, are subject to taxation; the commercial activity of plaintiff, which is a comparatively large business enterprise, has heretofore escaped taxation in the State. If this tax fails in its effort to secure from plaintiff its proportionate contribution in taxes for the privileges and protections which it enjoys within the State, the immunity of plaintiff from taxes in this State will be complete. The reasoning leading to such a result we do not find persuasive. We do not find in the grant of power to Congress to regulate interstate commerce any implied prohibition which strikes down the tax here levied. Rather do we find in the reservation to the State of powers not [fol. 23] granted to the United States (U. S. Constitution, X Amendment), coupled with the retention in the people of this State of "all powers not delegated" by our Constitu-

tion (N. C. Constitution, Art 1, sec. 37), a mandate of organic law which is compelling in its implications. "In selecting the objects of taxation, in the classification of business and trades for this purpose, and in allocating to each its proper share of the expenses of government, the General Assembly has been given a wide discretion. The continued maintenance of government itself as a great communal activity in behalf of all the citizens of the State is dependent upon an adequate taxing power." Tobacco Co. v. Maxwell, Commissioner of Revenue, 314 N. C., 367 (371-2).

For the reasons given, the judgment of the Court below is Reversed.

Seawell, J., took no part in the consideration or decision of this case.

Stacy, C. J., dissents.

A. True Copy.
Edward Murray, Clerk of the Supreme Court of North Carolina. (Seal of the Supreme Court of the State of North Carolina.)

[fol. 24] [File endorsement omitted.]

[fols. 25-26] IN SUPREME COURT OF NORTH CAROLINA

BEST & COMPANY, INC.,

vs.

A. J. MAXWELL, Comm'r of Revenue

JUDGMENT—June 16, 1939

This cause came on to be argued upon the transcript of the record from the Superior Court of Wake County: upon consideration whereof, this Court is of opinion that there is error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Heriot Clarkson, Justice, be certified to the said Su-

perior Court, to the intent that the Judgment is Reversed. And it is considered and adjudged further, that the plaintiff do pay the costs of the appeal in this Court incurred, to-wit, the sum of Fifty-one & 35/100 dollars ($51.35), and execution issue therefor.

A true copy.

Edward Murray, Clerk of the Supreme Court.
(Seal of the Supreme Court of the State of North Carolina.)

[fol. 27] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

PETITION FOR REHEARING—Filed July 25, 1939

Now comes Best & Company, Inc., plaintiff appellee, and respectfully petitions the Court to rehear the appeal in this case, and upon such rehearing (a) to affirm the judgment of the Superior Court of Wake County, or (b) at least correct the statements contained in the opinion of the Court to the effect that the Act in question is not challenged as violating any constitutional provision except the Commerce clause of the Constitution of the United States, to the end that the opinion may show that the Act was challenged upon the record and in the plaintiff's brief as violating the Equal Protection of Law clause of the Constitution of the United States, and was challenged by its petition to rehear as violating the Due Process of Law clause of the Constitution of the United States.

Summary of Facts

The plaintiff commenced an action in the Superior Court of Wake County against A. J. Maxwell, Commissioner of Revenue, to recover $250.00 representing a tax paid by the [fol. 28] plaintiff petitioner under protest, levied by Chapter 127, Sec. 121, subsection (e) (Revenue Act of 1937), of the Public Laws of 1937, together with interest thereon. Judgment was rendered in favor of the plaintiff and against the defendant in the Superior Court of Wake County. The defendant appealed from the judgment of the Superior Court of Wake County to this Court, and on June 16, 1939,

this Court reversed the judgment of the Superior Court of Wake County, and an opinion was filed on the same date written by Mr. Justice Clarkson. Mr. Chief Justice Stacy dissented therefrom, and Mr. Justice Seawell took no part in the consideration or the decision of the appeal.

Matter Overlooked by Court

The opinion filed herein expressly states in the first paragraph that the only question raised on appeal was whether or not the taxing act in question violated the Commerce clause of the Constitution of the United States, Article I, Sec. 8(e). This statement is reiterated elsewhere in the opinion of the Court. The plaintiff petitioner respectfully avers that the Court overlooked certain other contentions of your petitioner respecting the invalidity of the taxing act in question as offending against the Constitution of the United States, in that it is expressly alleged in Article 4 of the complaint (R. p. 2) and Article 5 of the amended complaint (R. p. 5) that the taxing act in question violates the Privileges and Immunities clause of the Constitution of the United States, being Article IV, Sec. 2, and the Equal Protection of Law clause of the Constitution of the United States, being Amendment Fourteen, Section 1, as well as the Commerce clause referred to and dealt with in the opinion of the Court. The brief of the plaintiff appellee deals with the Equal Protection of Law clause and the Privileges and Immunities clause of the Constitution of the United States (see page 15). Your petitioner also avers that when this appeal came on for oral argument in this Court, counsel [fol. 29] arguing the case for the plaintiff appellee called the Court's attention to all contentions set forth in this brief, but for want of time the contentions of the plaintiff appellee respecting the Privileges and Immunities clause and the Equal Protection of Law clause were not fully developed.

The plaintiff appellee now recognizes that its contention that the taxing act in question violates the Privileges and Immunities clause of the Constitution of the United States is not sound, the said clause having been construed as not applicable to corporations, but it is believed that the contention made by the plaintiff appellee that the taxing act in question violates the Equal Protection of Law clause of the Constitution of the United States is well founded.

Error Committed

Your petitioner respectfully avers that this Court committed an error of law in its judgment reversing the judgment of the Superior Court of Wake County, in that:

1. This Honorable Court's decision construes the tax in issue to be a "use tax" for the use of local property despite the fact that (A) the very same section which imposes the tax denominates it a "privilege tax" "for the privilege of displaying such samples" (Sec. 121(e)); and (B) the statute specifically says that the tax is imposed as "State license tax for the privilege of carrying on the business, exercising the privilege, or doing the act named," and that the license which is issued shall "constitute a privilege to conduct the business named" (Sec. 100).

Upon the principle of noscitue a sociis all parts of the same section and chapter should be read in unison. Each of the taxes imposed by Chapter 127 is a privilege or license [fol. 30] tax; Caldwell v. North Carolina, 187 U. S. 622, and Sec. 121 (in which is contained the tax in issue) is captioned "Peddlers", each subdivision of which imposes a tax for the privilege of engaging in the business of peddling, hawking, itinerant selling, etc. Manifestly the disputed tax should not be isolated from all the others and denominated something entirely different—something directly opposite to what the Legislature has expressly provided.

A use tax is "a tax upon property after importation is over;" it is a property tax upon the privilege of use, which is one of the attributes of ownership: Henneford v. Silas Mason Co., 300 U. S. 577, pp. 582, 586. None of those elements is present in the display of samples in a hotel room rented temporarily for the purpose of securing orders for retail sale. What property imported by plaintiff into North Carolina is made the base of the tax? Did plaintiff import the hotel room into North Carolina, and what rights of ownership does it have therein?

The decision herein wisely cautions against the dangers that lurk in the use of catch words and labels, e. g., "interstate commerce". By the same token, calling the tax in issue a "use tax" does not obliterate the fact that it is a direct burden upon interstate commerce and one of the means by which that commerce is carried on. See Henneford Case, Supra, p. 586.

Whether or not a State law or tax imposed thereunder deprives a party of rights secured by the Federal Constitution depends not upon the construction or characterization of the act by the State Court, but upon its practical operation and effect: Stewart D. G. Co. v. Lewis, 294 U. S. 550, 555; American Mfg. Co. v. St. Louis, 250 U. S. 459, 462-3; Crew L. Co. v. Penn., 245 U. S. 292, 294.

The decision herein denominates the tax a "use tax" to [fol. 31] distinguish it from those numerous State license, privilege and occupation taxes which have been invalidated by the Supreme Court of the United States. But the distinction is transparent. The statute here involved levies a privilege tax, furnishing only a new method of exaction. It is at most a change of form without any change in substance, in order to accomplish the same old prohibited result: Alpha C. Co. v. Mass., 268 U. S. 203, 217-218.

A State cannot under the guise of a license tax or any other type or form of tax called by an attractive name impose burdens upon interstate commerce transacted within its limits. Such taxation amounts to a regulation of commerce, which belongs solely to Congress. Any State law is unconstitutional and void which requires a party either to take out a license for carrying on interstate commerce or to engage in any of the pursuits by which that commerce is carried on. Alpha C. Co. v. Mass., Supra; Crutcher v. Ky., 141 U. S. 47; Brennan v. Titusville, 153 U. S. 289, 299; Stockard v. Morgan, 185 U. S. 27; International T. Co. v. Pigg, 217 U. S. 91, 112; Crenshaw v. Ark., 227 U. S. 389; Leloup v. Mobile, Supra; Ling v. Michigan, 135 U. S. 161, 166; Caldwell v. North Carolina, Supra; Ozark P. L. Co. v. Monier, 266 U. S. 548; Helson & R. v. Ky., Supra, at p. 249; Fisher's B. S. Inc. v. Tax Commission, 297 U. S. 650, 655-6.

"neither licenses nor indirect taxation of any kind, nor any system of State regulation, can be imposed upon interstate commerce any more than upon foreign commerce; and * * * all acts of legislation producing any such result are, to that extent, unconstitutional and void."

Crutcher v. Ky., Supra, at p. 62.

Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves: Brennan v. Titusville, [fol. 32] Supra, at p. 303; Welton v. Mo., 91 U. S. 275, 278. A tax on the display of articles for the purpose of securing

orders for the retail sale of such goods in interstate commerce is in effect a tax on the business of selling merchandise in interstate commerce: Brown v. Md., 12 Wheat. 419, 444. The exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is a tax on the business itself: McCall v. Cal., 136 U. S. 104, 108-9; Leloup v. Mobile, Supra, at p. 645; Real Silk Mills v. Portland, 268 U. S. 325, 335; Leisy v. Hardin, 135 U. S. 100, 123; Cooney v. Mountain S. T. & T. Co., 294 U. S. 384, 392; Bingaman v. Golden Eagle Lines, 297 U. S. 626; Helson & R. v. Ky., 279 U. S. 245, 250.

2. The decision herein is directly contrary to numerous decisions of the Supreme Court of the United States holding that a merchant of goods, which are legitimate subjects of commerce, who carries on his business in one State, can send an agent into another State to display samples of his merchandise and solicit orders therefor without paying to the latter State a tax for the privilege of thus trying to sell the goods. A license tax or any tax which falls directly upon the use of one of the means by which commerce is carried on is a direct burden on interstate commerce. Mr. Justice Holmes, more than 30 years ago, held that the law on this subject "is established": Robbins v. Shelby, 120 U. S. 489; Asher v. Texas, 128 U. S. 129; Stoutenburg v. Hennick, 129 U. S. 141; Crutcher v. Ky., 141 U. S. 47; Brennan v. Titusville, 153 U. S. 289; Stockard v. Morgan, 185 U. S. 27; Caldwell v. North Carolina, 187 U. S. 622; Rearick v. Penn., 203 U. S. 507; Dozier v. Alabama, 218 U. S. 124; Crenshaw v. Arkansas, 227 U. S. 389; Rogers v. Arkansas, 227 U. S. 389; Rogers v. Arkansas, 227 U. S. 401; [fol. 33] Davis v. Va., 236 U. S. 697; Real Silk Mills v. Portland, 268 U. S. 325.

These authorities and the principle for which they stand have not fallen into "innocuous desuetude," nor have they become old, dry and stale. On the contrary, they have received the uniform approval of the Supreme Court of the United States up to the very latest decisions of that Court: Southern Pacific Co. v. Gallagher, 306 U. S. 167, 174; Gwin v. Henneford, 305 U. S. 434, 437, 441; South Carolina v. Barnwell, 303 U. S. 177, 185, 186; Cooney v. Mountain S. T. & T. Co., 294 U. S. 384, 392; Minn. v. Blasius, 290 U. S. 1, 9; Texas T. Co. v. New Orleans, 264 U. S. 150—dissent by

Justices Brandeis and Holmes, which however also cited with approval the authorities above referred to.

See, also, Cheney Bros. v. Mass., 246 U. S. 147, 153-154; McCall v. Cal., 136 U. S. 104, 108-111.

In the Cheney Bros. Case, Supra, a Connecticut corporation was held not to be subject to a Massachusetts excise tax despite the fact that it maintained a selling office within the latter State, solicited and took orders subject to approval by the home office, and shipped merchandise directly to the purchaser. The Court held as follows, at p. 153:

"We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. *The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation.*" (Italics ours.)

In the Gwin v. Henneford Case, Supra, the question was [fol. 34] whether a Washington tax measured by the gross receipts of the appellant therein from its business of marketing fruit shipped from Washington to the places of sale in various States, and in foreign countries, was a burden on commerce in violation of the Constitution. The Supreme Court of Washington held that the shipment of fruit from the state of origin to points outside and its sale there involved interstate commerce, but that appellant's activities in Washington in promoting the commerce were a local business subject to State taxation. In reversing this contention, Mr. Justice Stone held at p. 437:

"We need not stop to consider which, if any, of appellant's activities in carrying on its business are in themselves transportation of the fruit in interstate or foreign commerce. For the Entire Service for which the Compensation is Paid is in Aid of the Shipment and Sale of Merchandise in that Commerce. Such Services are within the Protection of the Commerce Clause, Robbins v. Shelby County Taxing District, 120 U. S. 489; Caldwell v. North Carolina, 187 U. S. 622; Real Silk Mills v. Portland, 268 U. S. 325."

Practically every State Court of last resort has recognized the authority and inherent correctness of these de-

cisions; attached hereto is a schedule setting forth a list of some of the State Court decisions. The latest decision (decided subsequent to the case at bar) involved Best & Company, Inc., the plaintiff herein, and a South Carolina statute almost precisely identical to the one in issue herein; a copy of that decision is likewise annexed hereto.

[fol. 35] 3. This Honorable Court's decision holds that plaintiff's activities in North Carolina are purely local in nature and separate and distinct from plaintiff's interstate transactions, and that the tax in issue does not therefore violate the commerce clause, since it only affects intrastate business.

It is respectfully submitted that the decision overlooks the fact that the orders solicited by plaintiff in North Carolina required and contemplated for their fulfillment transactions conceded to be in interstate commerce, with resulting delivery through the channels of interstate commerce direct from New York to the customers in North Carolina.

The display in North Carolina was exclusively in furtherance of the admitted interstate activities of the plaintiff, and was the means by which that business was done. By its very nature plaintiff's method of transacting business transcends State lines, involving the constant use of the channels of interstate commerce, and consisting of purchasing merchandise in one State, finding customers for it in other States, making contracts of sale, and transporting the merchandise direct from the home State of plaintiff into the State in which the customers are situated.

The protection against the imposition of burdens upon interstate commerce is practical and substantial, drawn from the course of business, and extending to whatever is necessary to the complete enjoyment of the right protected. It is based upon broader considerations than the existence of technically binding contracts or the time and place where title passed, and includes all the means and instruments by which such commerce is carried on. The display of samples, the solicitation of orders, and the negotiation of sales of goods which are in another State, for the purpose of in-
[fol. 36] troducing them into the State in which the negotiation is made, is interstate commerce and a State may not levy a tax or impose any other restraint thereon. Such restrictions affect the very foundations of interstate com-

merce: Robbins v. Shelby, and other cases cited supra, at p. 2.

See, also, Sonneborn Bros. v. Cureton, 262 U. S. 506, 515; Delamater v. S. Dak., 205 U. S. 93, 97, 100-101; Ozark P. L. Co. v. Monier, 266 U. S. 555, 565.

Concededly there is a point of time when the immunity ceases and the power of the State to tax commences. But equally obvious is it that that point of time is not reached when the taxpayer is actively engaged in negotiating sales of goods which are located in another State for direct shipment to the purchaser. Brown v. Md., 12 Wheat. 419, 441.

The decision herein holds that plaintiff's activities in North Carolina bear an analogy to production, "which has consistently been held not to constitute interstate commerce." In support of that proposition there is cited the case of Carter v. Carter Coal Co., 298 U. S. 238 (Justices Cardozo, Brandeis and Stone dissenting). In that case it was held that the steps leading to the production of the coal did not constitute commerce; but with equal clarity the Court pointed out that all negotiations for the disposal of the coal and all the means and instruments by which it was sold were subjects of interstate commerce. Moreover, in the Labor Board cases, 301 U. S. 1, 49 and 58, and in Edison Company v. Labor Board, 305 U. S. 197, which were decided after the Carter case, the local productive activities of industrial concerns and utilities were held to constitute interstate commerce.

[fol. 37] 4. This Honorable Court's decision holds that the instant tax is non-discriminatory, applicable to residents and non-residents alike, and intended to remove a previously existing discrimination against local merchants.

The generality of an exaction will not save it if it directly burdens interstate commerce, which cannot be taxed even though a tax should be laid on commerce carried on solely within the State: Robbins v. Shelby, supra, 497; Brennan v. Titusville, supra; Cooney v. Mountain S. T. & T. Co., 294 U. S. 384, 393; Pacific T. & T. Co. v. Tax Commission, 297 U. S. 403, 411-412; Adams Mfg. Co. v. Storen, 304 U. S. 307, 312.

The tax in issue is, however, discriminatory and that was unquestionably one of its objects. (The Raleigh Times 9-22-37—"Political Pin Wheel").

A regular merchant of North Carolina is not subject to the tax if he conducts a hotel display. And, assuredly, one who is not a merchant would have no occasion to exhibit samples for the purpose of obtaining orders, as he is not in the business of selling merchandise.

Curiously, peddlers and all other itinerant salesmen pay taxes ranging from $15.00 to $100.00, whereas $250.00 is the fee for hotel displays.

"It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no [fol. 38] occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of is principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it."

Robbins v. Shelby, 120 U. S. at p. 498.

The statute authorizes the imposition on plaintiff of taxes aggregating $750.00. (State, county and municipal) for conducting a 2 or 3 day exhibit of a necessarily limited number of articles which can be displayed within the confines of a hotel room and if plaintiff conducts exhibits in other

cities and towns in North Carolina, it is subject to an additional tax of $250.00 for each county and town.

It must be borne in mind that the plaintiff is subject to all the taxes imposed upon corporations in its home State of New York.

To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every per-
[fol. 39] son is entitled to exercise under the laws of the United States: Crutcher v. Ky., 141 U. S. 47, 57; International T. Co. v. Pigg, 217 U. S. 91, 109-110; Sprout v. South Bend, 277 U. S. 163, 171; Helson & R. v. Ky., 279 U. S. 245, 249.

The invalidation of the statute in issue as applied to plaintiff's activities does not deprive North Carolina of any taxes to which it is justly or properly entitled: Robbins v. Shelby, supra, at pp. 496-497.

If there is any problem to be remedied, it is up to the Federal Congress to do so. State legislation, such as the statute in issue, would cause precisely those problems which the constitutional provision was designed to eliminate, and every town, city and State would ultimately have a Chinese wall around it. Brown v. Md., 12 Wheat. 419, 444-6; Caldwell v. N. Car., supra; Welton v. Mo., 91 U. S. 275, 280-281; Stafford v. Wallace, 258 U. S. 495, 518, 519; Helson & R. v. Ky., supra, 251; Gwin v. Henneford, 305 U. S. 434, 440.

5. The tax deprives plaintiff of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States because, as pointed out in point 4, supra, it effects a direct, arbitrary and gross discrimination against plaintiff and in favor of other merchants, especially resident merchants, similarly situated.

The plaintiff appellee, in its complaint, amended complaint and in its brief asserted the unconstitutionality of the taxing act in question upon the ground that it violated the Commerce clause, the Privileges and Immunities clause (now abandoned) and the Equal Protection of Law clause of the Constitution of the United States. The errors alleged to have been committed by the Court upon these questions
[fol. 40] have already been discussed in this petition. In addition, the plaintiff appellee feels that the taxing act in question offends against the Due Process of Law clause of the Constitution of the United States, being Amendment

XIV, Sec. 1, a point not heretofore specifically raised. The plaintiff appellee now asserts as an additional error:

6. The statute in issue exerts the taxing authority of the State over property and rights which are wholly beyond the confines of the State and not subject to its jurisdiction and, therefore, constitutes a taking of plaintiff's property without due process of law in violation of the Fourteenth Amendment, in that plaintiff's activities constitute interstate commerce, pure and simple, and are not a privilege granted by the State and the tax is in effect, a tax upon plaintiff's goods which are situated outside of the State of North Carolina. Looney v. Crane Co., 245 U. S. 178, 187; Allgeyer v. Louisiana, 165 U. S. 832.

The judgment complained of has been fully performed and the costs paid. The plaintiff appellee submits herewith certificates of two members of the Bar of this Court who have no interest in the subject matter of this action and have never been of counsel for either party to this action, each of whom have been, for more than five years, a member of the Bar of this Court, to the effect that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and that they believe the Court has overlooked certain contentions of the plaintiff appellee, and that they deem the judgment and the opinion filed herein erroneous.

Wherefore, your petitioner prays that the Court rehear this appeal and affirm the judgment of the Superior Court of Wake County, or, failing this, that the Court correct the [fol. 41] statement contained in its opinion to the effect that the Act in question was not challenged as violating any constitutional provision except the Commerce clause of the Constitution of the United States, to the end that the opinion may show that the Act was challenged as violating the Equal Protection of Law clause of the Constitution of the United States upon the record and in the plaintiff's brief and that the Act is challenged by this petition to rehear as violating the Due Process of Law clause of the Constitution of the United States.

Manly, Hendren & Womble, W. P. Sandridge, Counsel for Plaintiff Appellee.

Duly sworn to by Alfred W. Miles. Jurat omitted in printing.

[fol. 42] STATE COURT DECISIONS

Alabama:

Lee v. Lafayette, 153 Ala. 675;
Beard v. Union & American Publishing Co., 71 Ala. 60;
Miller v. State, 7 Ala. App. 183;
Ware v. Hamilton Brown Co., 92 Ala. 145;
Leverett v. Garland, 206 Ala. 556;
Citizens Nat. Bank v. Bucheit, 71 So. 82;
Crum v. Prattville, 155 Ala. 154;
Ineichen v. Anniston, 10 Ala. App. 605;
Ex parte Murray, 93 Ala. 78.

Arkansas:

Gunn v. White Sewing Machine Co., 57 Ark. 24;
Coblentz & Logsdon v. Powell, 148 Ark. 151;
Sillin v. Hessig-Ellis Drug Co., 181 Ark. 386;
Temple v. Gates, 186 Ark. 820.

California:

International Trust Co. v. Leschen, 41 Cal. 299;
Charlton Silk Co. v. Jones, 190 Cal. 341;
Ex parte Thomas, 71 Cal. 204.

Colorado:

Salvage v. Central Elec. Co., 59 Colo. 66;
Pueblo v. Larkins, 63 Colo. 197;
Wilcox v. People, 46 Colo. 382.

Florida:

Myers v. Miami, 100 Fla. 1537.

Georgia:

Crump v. McCord, 154 Ga. 147;
Dennison Mfg. Co. v. Wright, 156 Ga. 789;
Smith v. Nolting First Mortgage Corp., 45 Ga. App. 253;
Stone v. State, 117 Ga. 292.

Idaho:

Belle City Mfg. Co. v. Frizzell, 11 Ida. 1;
Toledo Computing Scale Co. v. Young, 16 Ida. 187;
In re Kinyon, 9 Ida. 642.

[fol. 43] Illinois:

Booz v. Texas & Pac. Ry. Co., 250 Ill. 376;
Pembleton v. Illinois C. M. A., 289 Ill. 99;
March Davis Cycle Mfg. Co. v. Strobridge, 79 Ill. App. 683;
Havens & Geddes Co. v. Diamond, 93 Ill. App. 557;
Lehigh Portland Cement Co. v. McLean, 245 Ill. 326;
American Sales Book Co. v. Wemple, 168 Ill. App. 639;
Frank Prox Co. v. Bryan, 185 Ill. App. 322;
American Art Works v. Chicago Picture Frame Works, 246 Ill. 610;
Holzman v. Canton, 180 Ill. App. 641.

Indiana:

McLaughlin v. South Bend, 126 Ind. 471;
Martin v. Rosedale, 130 Ind. 109;
Huntington v. Mahan, 142 Ind. 695.

Iowa:

Burnham Mfg. Co. v. Queen Stove Works, Inc., 214 Ia. 112.

Kansas:

State v. Hickox, 64 Kan. 650;
City of Kensley v. Dyerly, 79 Kan. 1.

Kentucky:

Commonwealth v. Read Phosphate Co., 113 Ky. 32;
Commonwealth v. Eclipse Hay Press Co., 31 Ky. L. R. 824;
Commonwealth v. Hogan M. & T., 25 Ky. L. R. 41;
Louisville Trust Co. v. Bear S. S. B. Co., 166 Ky. 744;
Commonwealth v. Baldwin, 29 Ky. L. R. 1074;
Lawton v. Stewart, 247 S. W. 14.

Louisiana:

Simmons Hdw. Co. v. McGuire, 39 La. Ann. 842;
McClellan v. Pettigrew, 44 La. Ann. 356;
State v. Schofield, 136 La. 702.

[fol. 44] Maine:

Royster Guano Co. v. Cole, 115 Me. 387.

Massachusetts:

Carstairs v. O'Connel, 154 Mass. 357;
James Thurman v. Chicago M. & St. P. Ry. Co., 254 Mass. 569.

Michigan:

Fifth Avenue Society v. Hastie, 155 Mich. 56;
Colt & Co. v. Sutton, 102 Mich. 324.

Mississippi:

Saxony Mills v. Wagner, 94 Miss. 233;
Overton v. Vicksburg, 70 Miss. 558.

Missouri:

Bauch v. Weber Flour Mills, 210 Mo. App. 666;
German-American Bank v. Smith, 202 Mo. App. 467;
Fleming v. Mexico, 262 Mo. 432;
Kansas City v. McDonald, 175 S. W. 917;
International Textile Co. v. Gillespie, 229 Mo. 397;
General Excavator v. Emory, 40 S. W. (2d).

Nebraska:

Menks v. State, 70 Neb. 669.

Nevada:

Ex parte Rosenblatt, 19 Nev. 439.

New Hampshire:

Campbell v. U. S. Radiator Corp., 167 Atl. 1050.

New Jersey:

Shephurst v. Borough of Avon, 128 Atl. 232;
Funk & Wagnalls Co. v. Stamm, 85 N. J. L., 301;
Wood & Selick, Inc. v. American Grocery Co., 96 N. J. L. 218;
Dickerson v. Levine, 98 N. J. L. 313.

[fol. 45] Oklahoma:

Auto Trading Co. v. Williams, 71 Okla. 302;
Wells Co. v. Howard & Co., 50 Okla. 776;
Kubby v. Cubie H. Co., 41 Okla. 116;
Baxter v. Thomas, 46 Pac. 479.

Oregon:

Endicott Johnson & Co. v. Multnomah County, 96 Ore., 679;
Bertin & L. v. Mattison, 69 Ore. 470;
Spaulding v. McNary, 64 Ore. 49;
Chicago Portrait Co. v. Bellingham, 270 F. 584;
Vermont F. M. Co. v. Hall, 80 Ore. 308.

Pennsylvania:

Commonwealth v. American Tobacco Co., 173 P. 531;
Mearshorn & Co. v. Pottsville Lumber Co., 187 Pa. 12;
Putney Shoe Co. v. Edwards, 60 Pa. Super. Ct. 338;
Hitchner W. P. & P. Co. v. Shoemaker, 75 Pa. Super. Ct. 520.

Rhode Island:

Berger v. Penn. Ry. Co., 27 R. I. 583.

South Carolina:

City of Lauren v. Elmore, 55 S. C. 477.

South Dakota:

State v. Delamater, 20 S. D. 23.

Tennessee:

Hurford v. State, 91 Tenn. 669;
State v. Scott, 98 Tenn. 254.

Texas:

North v. Mergenthaler L. Co., 77 S. W. (2d) 580;
Louis v. Irby C. & T. Co., 45 S. W. 476;
Harkins v. State, 75 S. W. 26
Turner v. State, 41 Tex. Crim. 545.

[fol. 46] Utah:

Parke Davis & Co. v. Fifth Judicial District Court, 77 P. (2d) 466;
Utah v. Holtgreve (1921) 26 A. L. R. 707.

Vermont:

State v. Pratt, 59 Vt. 590.

Virginia:

Commonwealth v. Castner C. & B. 138 Va. 81;
Adkins v. Richmond, 98 Va. 91.

Washington:

Rich v. Chicago B. & Q. Ry. Co., 34 Wash. 14;
State v. Glasky, 50 Wash. 598.

West Virginia:

Pennywitt v. Blue, 73 W. Va. 718;
State v. Lichtenstein, 44 W. Va. 99.

Wisconsin:

Loverin & B. Co. v. Travis, 135 Wis. 322;
American Slicing Machine Co. v. Jaworski, 179 Wis. 634.

Wyoming:

State v. Byles, 22 Wyo. 136;
Clements v. Casper, 4 Wyo. 494;
State v. Willingham, 9 Wyo. 290.

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,
County of Richland:

THE STATE

v.

J. YETTER, Defendant

DECISION

This case comes before me on appeal from the Court of Magistrate Wm. A. Gunter of Richland County from a conviction and sentence of the defendant charged with violation of Act 705, page 1569, Acts of the General Assembly of 1938. The pertinent part of the Act that the defendant is [fol. 47] charged with violating is as follows:

"Section 1. License for Temporary Display of Samples, Goods, Wares or Merchandise Secure Sales at Retail.—Be it enacted by the General Assembly of the State of South Carolina: That every person, firm or corporation not being a regular retail merchant in the State of South Carolina who shall display samples, goods, wares or merchandise in any hotel room or in any room or house rented or occupied temporarily for the purpose of securing orders for the retail sale of such goods, wares or merchandise so displayed, shall apply for in advance and procure a state license from the South Carolina Tax Commission for the privilege of displaying such samples, goods, wares or merchandise, and shall pay an annual privilege tax of two hundred and fifty ($250.00) Dollars, which license shall entitle such person, firm or corporation to display such samples, goods, wares or merchandise in any county of this State; provided, that this Act shall not apply to displays of samples, goods, wares or merchandise at conventions, expositions or fairs."

The Act provides that one convicted of violating its terms shall be punishable by a fine not exceeding one hundred ($100.00) dollars, in addition to the payment of the license or by imprisonment not exceeding thirty (30) days.

The agreed facts are: that the defendant is not a regular retail merchant in the State of South Carolina; that at the

times alleged in the warrant he was displaying samples, goods, wares or merchandise in a room in the Columbia Hotel, Columbia, South Carolina, which had been rented or occupied for the purpose of securing orders for the retail sale of such goods, wares or merchandise. It was testified to by the defendant, and not denied or contradicted by the State, that he was a resident of the State of New York; that his salary and expenses were paid direct from the New York office; that he only took orders for goods, which orders [fol. 48] were forwarded to New York to be filled and the goods shipped by mail to the customer; that the defendant received no money or payment from the customer, and made no deliveries, but only solicited orders for goods desired from the samples displayed; that the persons invited to see the samples were those selected by the New York office and notified of the display of the goods by that office; that collection for the orders filled was left to the New York office.

Upon the trial of the defendant, the Magistrate found him guilty of violating the Act in question, and imposed sentence upon the defendant in accordance with the Act. It is from this judgment and sentence that the defendant appeals to this Court, on the following grounds: "That the Magistrate erred in finding the defendant guilty because the Statute in question, Act 705 of 1938, is unconstitutional, null and void in that it interferes with interstate commerce and is in violation of Article I, Section VIII of the Constitution of the United States, and that it abridges the privileges and immunities of citizens of the United States and deprives the defendant of his liberty and property without due process of law and denies to the defendant equal protection of the laws in violation of Article XIV, Section 1, of the Constitution of the United States and Article I, Section 5, of the Constitution of South Carolina."

The defendant has not argued the contention of the unconstitutionality of the Act under the due process clauses of the State and Federal Constitution; therefore, this Court will not consider the appeal upon those grounds.

Both appellant and respondent have relied upon the effect of "the interstate commerce clause" of the Federal Constitution as controlling the termination of this case. The only question to be decided is, whether or not Act 705, Acts of the General Assembly of 1938, imposes a burden or restriction upon interstate commerce as prohibited by Arti-

[fol. 49] cle I, Section VIII of the Constitution of the United States?

Section VIII, sub-division 3, of Article I of the Federal Constitution, delegates to the Congress of the United States the power "to regulate commerce with foreign nations, and among the several States and with the Indian Tribes." This commerce among the several States has been defined in the case of State v. Holleyman, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567, 11 L. R. A. (N. S.) 552, 24 L. R. A. (N. S.) 175, A. L. R. 1094, thus:

"Interstate commerce ordinarily consists of three elements, to-wit: (1) The purchasing of merchandise by a resident of one State from a resident of another State; (2) the delivery of the articles of commerce; and (3) the transportation thereof. The purchase may be made by the buyer in person, *or through a traveling salesman of the non-resident, or by an order sent by the purchaser to the non-resident.* The delivery may be made directly to the purchaser when the goods are sold, or when they reach their destination, in cases where they have been consigned to him." (Italics added.)

The facts in the case at bar squarely fit the foregoing definition: The defendant in the instant case was a traveling salesman for the non-resident seller; he took the order for the merchandise, forwarded it to the non-resident seller who in turn shipped it from the foreign State to the resident purchaser in this State and delivery was made by the carrier. Each element of the definition of interstate commerce is present in this transaction and, as I view it, each step is a necessary link in the chain. It is argued that the tax as imposed is not for soliciting business or for taking orders but for the privilege of displaying the goods in a temporary show room and therefore, does not impose a burden or restriction on interstate commerce. I cannot agree with this theory. Each act done by this defendant was a related and necessary step in the consummation of [fol. 50] a transaction in interstate commerce. It is true that the defendant's principal does not have to come into this State to transact business and the clear intent of this Act is to discourage, to say the least, his doing so, however, it is his right to do so and the Article of the Constitution here invoked was specifically included so that such busi-

ness or commerce could be freely transacted between residents of the several States without hindrance and burden.

In the conclusion I have reached, I am amply supported by the decisions of our Supreme Court and the United States Supreme Court. In the Holleyman case, supra, the defendant, and others were transporting liquor from North Carolina to their homes in this State after dark, in their own vehicles; they were arrested in this State for violation of a Statute which prohibited transporting liquor in the State after dark. Upon appeal from the conviction, our Supreme Court, by divided opinion, upheld the conviction, but upon rehearing before an en banc Court, this decision was reversed and likewise the judgment of the lower Court. The sole point in issue in that case, as here, was whether or not such a Statute was prohibited by the interstate commerce clause of the Federal Constitution and the final decision resolved that question in the defendant's favor? In the case just referred to, the defendant, a resident of South Carolina, purchased and received in North Carolina a package of liquor and was transporting same from that State to this State in his own vehicle. Our Supreme Court held that while the liquor was being transported and until the defendant arrived at his home, he was engaged in interstate commerce and to arrest Holleyman and confiscate the liquor was such a burden upon that commerce as is prohibited by the commerce clause of the Federal Constitution.

Under very similar facts as in the case at bar, the United [fol. 51] States Supreme Court, in the case of Robbins v. Taxing District of Shelby County (Tennessee), 120 U. S. 489, 30 L. Ed. 694, held that a Statute, similar to the one here involved, was unconstitutional as repugnant to the "Commerce Clause." In that case the Court fixes the point at which a transaction becomes interstate commerce, using this language:

"But to tax the sale of such goods, or the offer to sell them before they are brought into the State is a very different thing and seems to me clearly a tax on interstate commerce itself, * * * *The negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce.*" (Italics added.)

In the case at bar, the displaying of samples of goods to be purchased in another State is an element in the negotia-

tion for the sale, and, therefore, constitutes interstate commerce. With facts and Statutes very similar to the case at bar, the United States Supreme Court has consistently held those Statutes to be restrictions upon interstate commerce and therefore, invalid. Stockard v. Morgan, 185 U. S. 27, 46 L. Ed. 785; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. Ed. 565; Brennan v. City of Titusville (Penn.), 153 U. S. 288, 38 L. Ed. 719; State v. Emert, 130 Mo. 241, 23 Am. St. Rep. 874, 156 U. S. 296, 39 L. Ed. 430; Real Silk Hosiery Mills v. City of Portland (Ore.) 268 U. S. 325, 69 L. Ed. 982.

In the case of State v. Emert, supra, the Missouri Supreme Court held: "the sale of goods which are in another state at the time of sale for the purpose of introducing them into the State, which a regulation concerning their sale is made, is interstate commerce, and a tax upon them before they are brought into the State is a tax on interstate commerce. The imposition of a license tax on the person so making sale of them is also, in effect, a tax upon the goods, [fol. 52] and illegal, because the State cannot tax goods beyond its jurisdiction; but as soon as the goods are brought into the State, and have become a part of its general mass of property, they become taxable the same as other similar property within the State." This holding of the Missouri Court was affirmed by the United States Supreme Court.

In Brennan v. City of Titusville, supra, the very question here presented was passed upon and it was there held that a regulation as to the manner of sale of subjects of commerce, whether by sample or not, and by exhibiting samples is a regulation of commerce and that an ordinance requiring a license of a manufacturer of goods in carrying on his business in another State by sending his agents there to solicit orders, conflicts directly upon the provisions of the Federal Constitution regulating interstate commerce which is within the exclusive jurisdiction of the Federal Government. Mr. Justice Brewer, delivering the opinion of the Court, said:

"It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed

by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

Again quoting from the same authority: "It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a [fol. 53] State may lawfully exact it, it may increase the amount of the execution until all interstate commerce in this mode ceased to be possible. And, notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent regulate it."

The Court reviewed numerous decisions in which it had passed upon similar questions and held that the license tax imposed in that case upon the defendant was a direct burden on interstate commerce and was, therefore, beyond the power of the State.

The respondent relies strongly upon the case of Best & Company, Inc. v. A. J. Maxwell, Commissioner of Revenue, decided by the Supreme Court of North Carolina, and filed June 16th, 1939, to sustain the validity of our Act on the same subject. The main provisions of the North Carolina Act are identical with ours, and the North Carolina Court held their Act to be constitutional. Notwithstanding in this case, like in the case before this Court, the facts were similar. The North Carolina decision was not concurred in by the entire Court, but I have not before me the dissenting opinion.

The writer holds the decisions of our sister State in the highest regard, but he finds himself unable to concur in the opinion of that Court upon the question here presented. In view of the numerous decisions of the United States Supreme Court, holding that the statute of this kind under the facts in the instant case, places a burden upon interstate commerce in contravention of the Federal Constitution, he finds himself in disagreement with the North Carolina decision.

There being a Federal question herein involved, it is to the decisions of the United States Supreme Court that we

must look for the proper interpretation of the commerce [fol. 54] clause of the Federal Constitution upon the subject that is here being dealt with. And, reluctant as this Court is to declare an Act of our Legislature unconstitutional, it has no alternative, in view of the decisions heretofore cited, as well as others, than to hold that the Act in question, insofar as it is attempted to be applied to the defendant in the instant case, under the facts here presented, clearly contravenes the Federal Constitution by placing a burden upon and attempting to regulate interstate commerce. It, therefore, follows, that the defendant has, under the facts in this case, been convicted under a statute which as to him is void.

The following cases from our own Court bear very strongly upon the question involved in the instant case: Jewel Tea Company, Inc. v. City of Camden, 171 S. C. 353, 172 S. E. 307; Zeigler v. Puritan Mills, 188 S. C. 367, 199 S. E. 420.

It Is, Therefore, Ordered, Adjudged and Decreed that Act 705, Acts of the General Assembly 1938, page 1569, insofar as it is attempted to be applied in this particular case, is unconstitutional and of no force or effect.

It Is Further Ordered that the judgment of the Magistrate's Court in the instant case be, and the same is reversed and that the defendant be discharged.

G. Duncan Bellinger, Resident Judge Fifth Judicial Circuit.

Columbia, S. C., July 12, 1939.

CERTIFICATE OF H. G. HUDSON

I Hereby Certify that I have been a member of the Bar of the Supreme Court of North Carolina for more than five years, and that I have never been of counsel to either party in the case of Best & Company, Inc. v. A. J. Maxwell, Commissioner of Revenue, and that I have no interest in the sub- [fol. 55] ject matter of this action. I further certify that I have carefully examined this case and the law bearing thereon and the authorities cited in the opinion, together with the record and briefs, and I am of the opinion:

(a) That the plaintiff, as shown by the record and its brief, asserted that the taxing act in question applying to

the plaintiff's business violates the Privileges and the Immunities Clause of the Constitution of the United States and the Equal Protection of Law Clause of the Fourteenth Amendment of the Constitution of the United States. I am of the opinion that the Privileges and Immunities Clause is not applicable. The Court has overlooked the issue raised by the pleadings and by the plaintiff's brief as to the violation of the Equal Protection of Law clause.

(b) The judgment of the Court is erroneous in reversing the Superior Court of Wake County and in upholding the constitutionality of Public Laws of 1937, Ch. 127, Sec. 121, subsection (e), being the Revenue Act of 1937. I am of the opinion that the Act constitutes, as applied to the plaintiff's business, a regulation of and taxation of interstate commerce in violation of the Constitution of the United States, and that it also deprives the plaintiff of equal protection of the law under the Fourteenth Amendment for the reasons set out in the pleadings, the plaintiff's brief and the petition to rehear. I think that the Act in question particularly deprives the plaintiff of the equal protection of law in exempting a regular retail merchant engaging in the same business as the plaintiff. For instance, Ivey's of Charlotte could transact the same type of business at any place in the State without subjecting itself to the tax.

(c) I am also of the opinion that the Act in question, as [fol. 56] applied to the plaintiff, deprives the plaintiff of the property without due process of law. This point does not seem to have been made in the original brief, but some of the authorities cited in the original brief and in the petition to rehear sustain the proposition.

July 24, 1939.

H. G. Hudson.

CERTIFICATE OF RICHMOND RUCKER

I Hereby Certify that I have been a member of the Bar of the Supreme Court of North Carolina for more than five years, and that I have never been of counsel to either party in the case of Best & Company, Inc. v. A. J. Maxwell, Commissioner of Revenue, and that I have no interest in the subject matter of this action. I further certify that I have carefully examined this case and the law bearing thereon

and the authorities cited in the opinion, together with the record and briefs, and I am of the opinion:

(a) The Court overlooked the contentions of the plaintiff, as set out in the record and the plaintiff's brief, to the effect that the taxing act in question (P. L. 1937, Ch. 127, Sec. 121 (e)) applied to the facts of this case, as shown by the stipulation contained in the record, violates the Equal Protection of the Law clause of the Constitution of the United States (XIV Amendment, Sec. 1). And further, I am of the opinion that this contention of the plaintiff, set out in the pleadings and brief, is meritorious for the reason that the classification enumerated by the Act: "Every person, firm or corporation Not being a Regular retail merchant in the State * * *" constitutes an unwarranted discrimination between Persons of this State and those of another State within its jurisdiction, the plaintiff being a person of New York State within the jurisdiction of this State.

[fol. 57] (b) I am further of the opinion that the judgment of the Court is erroneous in reversing the judgment of the Superior Court of Wake County and in upholding the constitutionality of that part of the taxing act (P. L. 1937, Ch. 127, Sec. 121 (b)), as applied to the facts disclosed by the record in that under the Commerce clause of the Constitution of the United States (Article I, Sec. 8, subsection 3), the exclusive power to regulate commerce is vested in Congress. As a consequence thereof, it is well settled that where the power of Congress to regulate is exclusive the failure of that body to enact specific legislation indicates its desire that the subject shall be free from any restrictions or impositions. It is manifest that the Legislature, by means of the device of a purported use tax, has undertaken to differentiate the tax in question from a license tax heretofore condemned by numerous decisions of the Supreme Court of the United States; however, the act construed from the point of view of what it actually accomplishes, as distinguished from what may have been the intent or purpose of the Legislature to accomplish, leads to the inevitable conclusion that its operative effect, applied to the facts of the record, constitutes a license tax. The decisions cited and relied upon by the plaintiff in its brief and petition to rehear seem to me to support this position.

(c) I am further of the opinion that the Due Process clause of the Constitution of the United States (XIV Amendment, Sec. 1) is violated by the decision of the Court for the reason that the taxing power of the State is here employed against activities affecting property interests of the plaintiff which are wholly beyond the confines of the State, and not subject to its jurisdiction.

Respectfully submitted, Richmond Rucker.

July 24, 1939.

[fol. 58] It is requested that the attached petition to rehear be referred by the Clerk of the Supreme Court of North Carolina to Mr. Justice Barnhill and Mr. Justice Winborne.

Manly, Hendren & Womble, W. P. Sandridge, Attorneys for Plaintiff, Appellee.

July 25, 1939.

ORDER ALLOWING PETITION FOR REHEARING

Petition to rehear endorsed: "Petition considered and allowed. This September 30, 1939.

M. V. Barnhill, J. J. Wallace Winborne, J."

A true copy.

Edward Murray, Clerk of the Supreme Court of North Carolina. (Seal of the Supreme Court of the State of North Carolina)

[fol. 59] IN SUPREME COURT OF NORTH CAROLINA

No. 451—Wake

BEST & COMPANY, INC.,

v.

A. J. MAXWELL, Commissioner of Revenue

Petition to rehear this case reported in 216 N. C., 114.

Strauss, Reich & Boyer; M. James Spitzer; Manly, Hendren & Womble; and W. P. Sandridge for plaintiff, petitioner.

Attorney General McMullan and Asst. Attorneys General Bruton and Gregory, for defendant, respondent.

Bailey & Lassiter, amicus curiae.

OPINION—Filed February 2, 1940

CLARKSON, J.:

The petition deals with a matter of form and also with one of substance.

The petition alleges an inadvertence in the interpretation of petitioner's position in that it was stated that petitioner challenged the act only upon the ground that it violates the Commerce Clause of the Constitution of the United States, whereas petitioner likewise challenged the enactment as "Offending against the privileges and immunities and the equal protection of the law clauses of the Constitution of the United States." It is contended by respondents that those matters were dealt with in substance, though without specific mention, in the body of the former opinion. However, to this extent the petition is allowed.

The petition further alleges error in the construction of the statute. The Court being evenly divided on this phase of the petition, Seawell, J., not sitting, the petition is sustained only to the extent above indicated.

Petition dismissed in part and sustained in part.

Winborne, J., concurring in part and dissenting in part.

Stacy, C. J., and Barnhill, J., join in this opinion.

A true copy.

Edward Murray, Clerk of the Supreme Court of North Carolina. (Seal of the Supreme Court of the State of North Carolina.)

[fol. 60] OPINION

WINBORNE, J., concurring in the partial allowance of the petition and dissenting from its dismissal in part:

The opinion heretofore filed in this case imputes to the statute a meaning not warranted by its terms. The construction is a forced one. It is conceded on all hands that if the tax is laid on the privilege of taking orders for goods to be shipped in interstate commerce, the act offends against the Constitution of the United States.

The provision of the act is that: "Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars ($250.00), which license shall entitle such person, firm or corporation to display such samples, goods, wares, or merchandise in any county in this State." P. L. 1937, Chapter 127, Section 121, subsection (e).

This is the exact language of the statute. It admits only of the interpretation that it is a tax on the privilege of taking orders for goods to be shipped in interstate commerce. The authorities are one in holding that such legislation is unconstitutional.

Nor can the construction heretofore given to the statute save it from constitutional offence. If the tax imposed be a "use tax", it is discriminatory. Leonard v. Maxwell, 216 N. C., 89.

Stacy, C. J., and Barnhill, J., join in this opinion.

A true copy.
Edward Murray, Clerk of the Supreme Court of North Carolina. (Seal of the Supreme Court of North Carolina.)

[fol. 61] [File endorsement omitted.]

[fol. 62] IN SUPREME COURT OF NORTH CAROLINA

BEST & COMPANY, INC.,

VS.

A. J. MAXWELL, Commissioner of Revenue

JUDGMENT—February 2, 1940

This cause came on to be argued upon the transcript of the record from the Superior Court of Wake County: upon consideration whereof,

It is adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Heriod Clarkson, Justice, be certified to the said Superior Court, to the intent that the petition is dismissed in part and sustained in part.

And it is considered and adjudged further, that the Plaintiff do pay the costs of the appeal in this Court incurred, to-wit, the sum of Twenty-four and 70/100 dollars ($24.70), and execution issue therefor.

A true copy.

Edward Murray, Clerk of the Supreme Court. (Seal of the Supreme Court of the State of North Carolina.)

(Here follows 1 photolithograph, side folio 63.)

FROM JUNE 1, 1937 TO MAY 31, 1938

No 110388

2-14-38

STATE OF NORTH CAROLINA

DEPARTMENT OF REVENUE

THIS IS TO CERTIFY THAT THE PERSON, FIRM OR CORPORATION NAMED BELOW, HAVING PAID THE TAX REQUIRED BY LAW, LICENSE IS HEREBY ISSUED TO ENGAGE IN THE BUSINESS OR PRACTICE THE PROFESSION OF

ADDITIONAL TAX OF $50.00 WILL BE IMPOSED FOR FAILURE TO KEEP LICENSE POSTED. OWNERSHIP NOT TRANSFERABLE.

Sec. 121 Tax $ 250.00 Penalty $ Total $

Displaying Merchandise

STATE WIDE LICENSE

Best & Company, Inc.
New York, N. Y.

ISSUED BY COMMISSIONER OF REVENUE

A. J. Maxwell
COMMISSIONER

B1035

63

48A

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[fol. 64] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

To the Justices of the Supreme Court of the State of North Carolina:

Your petitioner, Best & Company, Inc., respectfully shows:

1. The petitioner is the plaintiff in the above entitled cause and applicant for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of North Carolina.

2. This suit was instituted by the petitioner in the Superior Court of Wake County, North Carolina, against the appellee above named as defendant to recover the sum of $250., together with interest thereon, which sum had been paid by the petitioner to the appellee involuntarily and under protest as tax under Section 121 (e) of Chapter 127 of the State of North Carolina Public Laws of 1937, C. S. 7880 (51) (e).

3. The complaint and the amended complaint allege that the said statute is unconstitutional, null and void, in that it contravenes inter alia Section 8 of Article I of, and Section 1 of the Fourteenth Amendment to, the Constitution of the United States, and that the tax thus sought to be recovered by the petitioner was exacted by the appellee without authority of law.

4. After trial of the suit the Superior Court of Wake [fol. 65] County rendered judgment in favor of the petitioner for the full amount sought to be recovered.

5. On appeal from the said judgment to the Supreme Court of the State of North Carolina the said judgment was reversed by the said Supreme Court, and judgment was entered by the said Supreme Court against the petitioner and in favor of the appellee on the 16th day of June, 1939.

6. Thereafter the petitioner filed in the said Supreme Court a petition to rehear, which was allowed by the said Supreme Court a petition to rehear, which was allowed by Supreme Court on September 30, 1939, in which the petitioner prayed for a rehearing of the appeal on the merits and for correction of a statement contained in the original opinion of the said Supreme Court as to the federal questions raised by the petitioner; and the said Supreme Court disposed of the said application on the 2nd day of February, 1940, by granting the petition insofar as it sought to correct the statement contained in the original opinion of the said Supreme Court as to the federal questions raised by the petitioner and, on equal division of the Justices of the said Supreme Court, by denying a rehearing of the appeal on the merits. The judgment of the said Supreme Court thereby and on the 2nd day of February, 1940 became final for purposes of review by and appeal to the Supreme Court of the United States.

7. Thereafter the petitioner applied to the Supreme Court of the State of North Carolina to affirm the judgment of the Superior Court of Wake County, on the ground that an affirmance thereof was effected by the equal division of the Justices of the said Supreme Court upon the application for rehearing of the appeal on the merits; and the said application was denied.

[fol. 66] 8. The Supreme Court of the State of North Carolina is the highest Court of said State in which a decision in this suit could be had.

9. In said suit there is drawn in question the validity of a statute of the State of North Carolina, to wit: Section 121 (e) of Chapter 127 of the State of North Carolina Public Laws of 1937, C. S. 7880 (51) (e), on the ground of its being repugnant to the Constitution of the United States, in that it contravenes Section 8 of Article I of, and Section 1 of the Fourteenth Amendment to, the Constitution of the United States, and the decision is in favor of its validity.

10. The case is one in which, under the legislation in force when the Act of Congress of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on writ of error.

11. The errors upon which your petitioner claims to be entitled to an appeal are more fully set forth in the assignment of errors filed herewith; and there is likewise filed herewith a jurisdictional statement.

12. No previous application has heretofore been made herein for the allowance of an appeal to the Supreme Court of the United States, or for the other relief herein prayed for.

Wherefore, petitioner prays for the allowance of an appeal from the Supreme Court of the State of North Carolina to the Supreme Court of the United States, in order that the decision and judgment of the Supreme Court of the State of North Carolina may be reviewed on appeal and reversed, and also prays that the Clerk of the Supreme [fols. 67-68] Court of the State of North Carolina make and transmit to the Supreme Court of the United States, under his hand and the seal of the Supreme Court of the State of North Carolina, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, as provided by law and in conformity with the Rules of the Supreme Court of the United States.

Dated, April 26, 1940.

Best & Company, Inc., Petitioner and Proposed Appellant, by Strauss, Reich & Boyer, Manly, Hendren & Womble, Attorneys.

[fol. 69] In Supreme Court of North Carolina

[Title omitted]

Assignment of Errors

Best & Company, Inc., plaintiff in the above entitled cause and applicant for the allowance of an appeal to the Supreme Court of the United States, assigns the following errors in the record of proceedings and final judgment of the Supreme Court of the State of North Carolina herein:

The Supreme Court of the State of North Carolina erred:

1. In holding that the provisions of Section 121(e) of Chapter 127 of the State of North Carolina Public Laws of

1937, C. S. 7880 (51) (e), are not repugnant to Section 8 of Article I of the Constitution of the United States.

2. In refusing to hold that the provisions of said statute of the State of North Carolina are repugnant to Section 8 of Article I of the Constitution of the United States in that:

(a) The said statute operates to place a tax or burden on interstate commerce which amounts to an unlawful regulation thereof, and to discriminate against such commerce in favor of intrastate commerce in the State of North Carolina.

(b) The tax imposed by the said statute and exacted from the appellant is a tax or burden on interstate commerce which amounts to an unlawful regulation thereof, and, as applied to the appellant, is a fixed-sum license or privilege tax on the business of soliciting orders for the purchase of goods to be shipped in interstate commerce, and constitutes a discrimination against such commerce and an un-[fol. 70] lawful obstruction of one of the essential and ordinary means and instrumentalities by which such commerce is legitimately carried on.

(c) If the tax imposed by said statute and exacted from the appellant is a use tax, as adjudged in said final judgment, it nevertheless constitutes a tax or burden on interstate commerce which amounts to an unlawful regulation thereof, and, as applied to the appellant, constitutes a discrimination against such commerce and an unlawful obstruction of one of the essential and ordinary means and instrumentalities by which such commerce is legitimately carried on.

3. In holding that the provisions of the said statute of the State of North Carolina do not deny to the appellant the equal protection of the laws and are therefore not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. In refusing to hold that the provisions of the said statute of the State of North Carolina deny to the appellant the equal protection of the laws and are therefore repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States in that:

(a) The said statute creates a whimsical, arbitrary, and capricious classification which has no reasonable or just basis therefor, and that its purpose, object and effect are to discriminate against the appellant and others who are not regular retail merchants in the State of North Carolina and in favor of local or regular retail merchants of said State who are not subject to the tax imposed by the said statute.

(b) The said statute imposes a tax or burden on the business transacted, sales made, and property situated without and not subject to the jurisdiction of the State of North Carolina, and that its purpose, object and effect are to discriminate against the appellant and others who are not regular retail merchants in the State of North Carolina and in favor of local or regular retail merchants of said State who are not subject to the tax imposed by the said statute.

5. In holding that the provisions of said statute of the [fols. 71-72] State of North Carolina do not deprive the appellant of property without due process of law and are therefore not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

6. In refusing to hold that the provisions of the said statute of the State of North Carolina deprive the appellant of property without due process of law and are therefore repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the tax imposed by the said statute and exacted from the appellant was a tax or burden on the business transacted and sales made by the appellant and property of the appellant situated without and not subject to the jurisdiction of the State of North Carolina.

7. In reversing, and in refusing to affirm, the judgment rendered by the Superior Court of Wake County, and in rendering final judgment in favor of the appellee and against the appellant.

For the errors hereinabove assigned the appellant prays that the said judgment of the Supreme Court of the State of North Carolina, dated June 16, 1939, in the above entitled

cause, be reversed and that judgment be entered in favor of the appellant.

Dated, April 26th, 1940.

Best & Company, Inc., by Strauss, Reich & Boyer, Manly, Hendren & Womble, Attorneys.

[fol. 73] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

CERTIFICATE OF CHIEF JUSTICE

I, Walter P. Stacy, Chief Justice of the Supreme Court of the State of North Carolina, certify:

1. That a final judgment in the above entitled suit in the Supreme Court of the State of North Carolina, the highest court of the State of North Carolina in which a decision in the suit could be had, was made and entered in said Supreme Court of the State of North Carolina on June 16, 1939; that a petition to rehear and to correct certain errors contained therein as to the federal questions raised by Best & Company, Inc., was duly filed by said Best & Company, Inc., in the Supreme Court of the State of North Carolina and allowed on September 30, 1939; that a decision of said Supreme Court of the State of North Carolina disposing of the petition to rehear was filed therein on February 2, 1940, on which date the judgment in the above entitled cause became final for purposes of appeal to and review by the Supreme Court of the United States.

2. That in said suit there is drawn in question the validity of a statute of the State of North Carolina, to-wit: Section 121 (e) of Chapter 127 of the State of North Carolina Public Laws of 1937, C. S. 7880 (51) (e), on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

3. That said Best & Company, Inc., duly and properly [fols. 74-75] raised the following substantial federal questions which were considered and passed upon by the Supreme Court of the State of North Carolina, and are available for review by the Supreme Court of the United States upon appeal, to-wit:

(A) That said statute is repugnant to and infringes the commerce clause (Section 8 of Article I) of the Constitution of the United States.

(B) That said statute is repugnant to and infringes the equal protection and due process clauses (Section 1) of the Fourteenth Amendment to the Constitution of the United States.

Dated, Raleigh, North Carolina, April 29, 1940.

W. P. Stacy, Chief Justice of the Supreme Court of the State of North Carolina.

[fol. 76] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Best & Company, Inc., for the allowance of an appeal in the above entitled cause to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of North Carolina, having been duly presented herein, accompanied by an assignment of errors and statement as to jurisdiction, together with prayer for reversal, and the record in this cause having been considered;

And it appearing from said petition, said other papers and the record in said cause that the appeal should be allowed; it is

Ordered that an appeal in the above entitled cause be and is hereby allowed to the Supreme Court of the United States from the judgment of the Supreme Court of the State of North Carolina entered June 16, 1939 as prayed in said petition; and it is further

Ordered that the Clerk of the Supreme Court of the State of North Carolina shall within 40 days from the date hereof make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, pursuant to law and in conformity with the rules of the Supreme Court of the United States; and it is further

Ordered that Best & Company, Inc. shall give a good [fols. 77-78] and sufficient bond in the sum of Five Hundred Dollars ($500) that it shall prosecute said appeal to effect, and, if it fail to make its plea good, shall answer all damages and costs.

Dated, Raleigh, North Carolina, April 29, 1940.

W. P. Stacy, Chief Justice of the Supreme Court of the State of North Carolina.

[fols. 79-85] Bond on appeal for $500.00 approved and filed April 29, 1940 omitted in printing.

[fols. 86-87] Citation in usual form showing service on Harry McMullan et al., omitted in printing.

[fol. 88] In Supreme Court of North Carolina

[Title omitted]

Praecipe Indicating Portions of Record to be Incorporated Into Transcript

To the Clerk of the Supreme Court of the State of North Carolina, Raleigh, North Carolina:

You are hereby requested, within the time specified in an order dated April 29, 1940 allowing an appeal herein, to make and transmit to the Supreme Court of the United States, under your hand and the seal of the Supreme Court of the State of North Carolina, a true copy of the following material parts of the record herein, which shall compose the transcript of record herein, to wit:

1. The entire record in the Supreme Court of the State of North Carolina.

2. Opinion of the Supreme Court of the State of North Carolina, dated June 16, 1939.

3. Judgment entered June 16, 1939 in the Supreme Court of the State of North Carolina.

4. Petition to rehear and allowance thereof.

5. The two opinions on rehearing, dated February 2, 1940.

6. License issued to Best & Company, Inc., by Commissioner of Revenue for the State of North Carolina.

7. Petition for appeal.

8. Assignment of errors.

9. Jurisdictional statement.

10. Certificate of Chief Justice of Supreme Court of the State of North Carolina.

11. Order allowing appeal.

[fols. 89-91] 12. Bond, approval thereof, and acknowledgment of service.

13. Citation with acknowledgment of service.

14. Praecipe with acknowledgment of service and stipulation as to portions of record to be included in transcript.

15. Proof of service of petition for and order allowing the appeal, together with copy of assignments of error and of the jurisdictional statement, and statement directing appellee's attention to the provisions of paragraph 3 of Rule XII of the General Rules of the Supreme Court of the United States.

16. Certificate of filing appeal papers with Clerk of Supreme Court of the State of North Carolina.

Dated April 29, 1940.

Strauss, Reich & Boyer, Manly, Hendren & Womble, Attorneys for Best & Company, Inc., appellant in the Supreme Court of the United States.

Service of a copy of the above praecipe acknowledged this 29th day of April, 1940.

Harry McMullan, Attorney General of the State of North Carolina. T. W. Bruton, Assistant Attorney General, Attorneys for A. J. Maxwell, Commissioner of Revenue for the State of North Carolina, appellee in the Supreme Court of the United States.

[fols. 92-93] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

CERTIFICATE OF FILING APPEAL PAPERS

I, Edward Murray, Clerk of the Supreme Court of the State of North Carolina, do hereby certify that the follow-

ing papers were filed with me as such Clerk on April 29, 1940 in the above entitled cause, to wit:

1. Petition for appeal to the Supreme Court of the United States.

2. Assignment of errors.

3. Jurisdictional statement.

4. Certificate of the Chief Justice of the Supreme Court of the State of North Carolina.

5. Order allowing appeal.

6. Bond.

7. Praecipe.

Dated, Raleigh, North Carolina, April 29, 1940.
Edward Murray, Clerk of the Supreme Court of the State of North Carolina.

[fol. 94] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

DOCKET ENTRIES

Appeal docketed 28 March, 1939.
Case argued 12 April, 1939.
Opinion filed 16 June, 1939.
Petition to rehear filed 25 July, 1939.
Petition to rehear allowed 30 September, 1939.
Case re-argued 16 December, 1939.
Opinion on petition to rehear filed 2 February, 1940.
Final Judgment entered 2 February, 1940.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 95] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed April 30, 1940.

Comes now the appellant and states that the points upon which it intends to rely in this Court in this case are as follows:

It adopts its assignment of errors as its points to be relied upon herein, which said assignment of errors it repeats and incorporates as a whole herein.

Appellant further states that it designates, as the parts of the record which it thinks necessary for the consideration of the said points, all the papers designated in its praecipe, which together constitute the whole of the record as filed.

Dated, April 29, 1940.

Nathaniel D. Reich, Lorenz Reich, Jr., M. James Spitzer, W. P. Sandridge, Counsel for Appellant.

[fols. 96-97] Service of a copy of the above statement acknowledged this 29 day of April, 1940.

Harry McMullan, Attorney General of the State of North Carolina; T. W. Bruton, Assistant Attorney General, Attorneys for A. J. Maxwell, Commissioner of Revenue for the State of North Carolina, appellee in the Supreme Court of the United States.

[fol. 98] [File endorsement omitted.]

Endorsed on Cover: File No. 44,368. North Carolina, Supreme Court, Term No. 61. Best & Company, Inc., Appellant, vs. A. J. Maxwell, Commissioner of Revenue for the State of North Carolina. Filed April 30, 1940. Term No. 61 O. T. 1940.